IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Appellant

v.

SNYDER'S DRUG STORES, INC.,
Appellee

On Writ of Certiorari to the Supreme Court of North Dakota

JOINT BRIEF AMICUS CURIAE OF THE AMERICAN PHARMACEUTICAL ASSOCIATION AND THE NATIONAL ASSOCIATION OF RETAIL DRUGGISTS

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PRELIMINARY STATEMENT

The American Pharmaceutical Association and the National Association of Retail Druggists file this joint brief amicus curiae, urging that the October 31, 1972, decision and order of the Supreme Court of North Dakota be reversed, and further urging that this Court's decision in *Liggett Co.* v. *Baldrige*, 278 U.S. 105 (1928) be overruled, to the extent that *Baldrige* may apply to the facts of this case.

INTEREST OF THE AMICI

The American Pharmaceutical Association (APhA) is a non-profit, membership corporation organized and existing under the laws of the District of Columbia since 1852. It is the national professional society of pharmacists in the United States, and its membership consists of more than 39,000 practicing pharmacists and pharmaceutical scientists and educators. Additionally, over 12,000 students enrolled in colleges of pharmacy hold membership in APhA.

The APhA and, of course, its members are vitally interested in the public health and welfare as they may be affected by the profession of pharmacy. In that regard, APhA exists for the purposes of rendering assistance in improving, promoting, and safeguarding the public health and welfare by: (1) maintaining an official compendium of drug standards and specifications; (2) promoting the safe use of drugs; (3) fostering and encouraging inter-professional relations; (4) improving the art and science of pharmacy for the general welfare by the dissemination of scientific information relating to drugs; (5) providing a system of education and training in the art of pharmacy; (6) supporting a system of licensure and registration of pharmacists; (7) developing, maintaining and enforcing a code of ethics for pharmacists calculated to safeguard the public; and (8) cooperating with the United States Government to the fullest in conducting research, examinations, investigations, experiments and in disseminating information.

One of the fundamental purposes of the APhA is the development, maintenance and enforcement of a professional code of ethics. The current version of the APhA Code of Ethics was adopted by vote of the

membership in August, 1969, and sets forth four canons which are particularly relevant to the public issues to be decided by this Court in this case. Underlying these four relevant canons is the membership philosophy that a pharmacist is a professional whose acts and practices affect the public interest and welfare and, accordingly, whose acts and practices must be conducted with the public interest foremost in mind. The four canons provide:

> Section 1
>
> A pharmacist should hold the health and safety of patients to be of first consideration; he should render to each patient the full measure of his ability as an essential health practitioner.
>
> Section 2
>
> A pharmacist should never knowingly condone the dispensing, promoting or distributing of drugs or medical devices, or assist therein, which are not of good quality, which do not meet standards required by law or which lack therapeutic value for the patient.
>
> Section 3
>
> A pharmacist should always strive to perfect and enlarge his professional knowledge. He should utilize and make available this knowledge as may be required in accordance with his best professional judgment.
>
> . . .
>
> Section 7
>
> A pharmacist should not agree to practice under terms or conditions which tend to interfere with or impair the proper exercise of his professional judgment and skill, which tend to cause a deterioration of the quality of his service or which require him to consent to unethical conduct.

The other joint amicus, the National Association of Retail Druggists (NARD), is a non-profit Illinois corporation whose membership consists of about 40,000 practicing pharmacists who own and control community pharmacies in the United States. Because it and its membership have the same goal as the APhA in assuring that the profession of pharmacy continues to conduct itself with the public interest and welfare foremost in mind, and because this Court's decision in this case will have major impact in attaining that goal, it joins with the APhA as an amicus in this case. In that regard, one of NARD's purposes is to assure professional control of the pharmacy by pharmacists. Both the APhA and NARD, on behalf of their members, believe that consistent with the modern concept of federalism, the States are not precluded by outmoded concepts of substantive Due Process from enacting pharmacy ownership statutes similar to the North Dakota Statute involved in this case. It is submitted that the North Dakota legislature, in its wisdom, was entitled to enact this reasonable ownership statute to eliminate what the legislature found to be an evil. We submit that this legislation should be sustained on the ground that this Court cannot say that the statute is not reasonably calculated to promote the public health and welfare.

Indeed, your amici have found that control by lay persons over the practice of pharmacy can be detrimental to the public interest. The practicing pharmacist is subjected to continually increasing pressures in many employment situations which leave him squarely with the Hobson's choice to be made between the economic objectives of his non-pharmacist master and his professional responsibilities such as those set

forth in the APhA Code of Ethics, as well as by his own professional judgment. Thus, the interest of your amici is directed at highlighting for the court the basic social and legal policy issue of whether professional ethics and performance are to be determined, controlled or dictated by professions themselves, or whether professional ethics and performance are to be determined, controlled or dictated by lay persons whose motivation may frequently be based not on professional or public welfare considerations, but rather on private economic interests. The State of North Dakota has answered that question by insisting that drug stores be controlled by professionals. That decision, we submit, the State is entitled to make under its police power.

ARGUMENT

SECTION 43-15-35(5) OF THE NORTH DAKOTA CENTURY CODE IS RATIONALLY RELATED TO THE PUBLIC HEALTH, SAFETY AND WELFARE.

The States have wide latitude in the exercise of their police powers, both in determining what the interests of the public require and in deciding on "reasonably necessary" means for the protection of those interests. Provided the legislative provision does not abridge a specific constitutional right, this court has stated that it will not substitute its judgment for that of the legislature. As this Court noted in *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 488 (1955), "it is enough that there is an evil at hand for correction and that it might be thought that the particular legislative measure was a rational way to correct it."

In the instant appeal, the evil at hand was the control of professional pharmacists by lay persons. The clear intent of the North Dakota legislature in framing

Section 43-15-35(5) of the North Dakota Century Code was to prevent the control of the profession of pharmacy by laymen and to assure professional guidance in the determination of pharmacy practices and policies. In the judgment of the legislature, the profession of pharmacy required, for the public welfare and for its own integrity, control over the exercise of its professional responsibilities to be vested in the profession itself rather than in professionally disinterested outsiders. Pharmacy is indeed a profession, and thus subject to far-reaching legislation under the state's police power. North Dakota, under its police power, was entitled to conclude through such preventive legislation that public health, safety and welfare would be furthered by a requirement that drug stores serving citizens of the State must be controlled by licensed professional pharmacists.

It is difficult to conclude with certainty that North Dakota, by requiring at least 51 percent control of pharmacies by professionals, will accomplish a perfect cure of the lay ownership evil perceived by the State. But as Justice Holmes recognized in his dissent in *Baldrige,* "the Constitution does not make it a condition of preventive legislation that it should work a perfect cure." 278 U.S. 105, 115 (1928). This Court has wisely held that it does not sit as a "superlegislature" to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. *See, e.g., Griswold* v. *Connecticut,* 381 U.S. 479, 482 (1965). For these reasons, we respectfully submit that the *Baldrige* decision is a judicial anachronism, no longer controlling or persuasive on the issues presented by this appeal. Because appellant has covered these points in its brief, there is

no need for your amici to enlarge on them except to state that APhA and NARD fully adopt and support appellant's position on this matter.

A. Pharmacy Is a Profession With All the Public Duties and Responsibilities Which that Status Entails.

This Court's 1928 decision in *Liggett* v. *Baldrige*, 278 U.S. 105 (1928) appears to conceive of the practice of pharmacy as a trade or occupation rather than a profession vitally affecting the public welfare. The Court concluded that the public interest in Pennsylvania was adequately safeguarded by related State legislation controlling the prescription, compounding, purchase and sale of medicines. Usurping the function of the State legislature, this Court concluded that ownership of a pharmacy by lay persons was unrelated to the public welfare, and therefore found that the statutory proscription overstepped the bounds of the Fourteenth Amendment's Due Process Clause.

The cases are legion that a State is empowered to closely regulate a profession, particularly one closely related to public health and safety. Pharmacy, without question, is such a profession; and today many States expressly recognize by statute the professional status of pharmacy.[1] Other States refer indirectly to the status of pharmacy as a profession; and many courts have concluded that pharmacy enjoys that status.[2] While it is possible that pharmacy may not

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[1] Colo. Rev. Stat. 1963, 48-1-25; Ill. Rev. Stat. 1965, ch. 91, § 55.1; La. Rev. Stat. § 37: 1206 (Supp. 1960); Nev. Rev. Stat. 1957, 639.213; Okla. Stat. 1961, Title 59, § 353.2; Tex. Rev. Civ. Stat. 1948, Art. 4542a, § 20; Va. Code Ann. § 54-399(a) (1967).

[2] *See, e.g., Supermarket General Corp.* v. *Sills*, 93 N.J. Super. 32, 225 A.2d 728 (1966); *Lee* v. *Gaddy*, 133 Fla. 749, 183 So. 4 (1938); and *Sashihara* v. *State Bd. of Pharmacy*, 8 Cal. App. 2d 69, 46 P.2d 804 (1935).

have been considered by this court as a profession in *Baldrige*, the concept of a profession is not static. For example, this court in *United States* v. *Laws*, 163 U.S. 258, 266 (1896) noted:

> "Formerly, theology, law, and medicine were known as *the professions;* as the applications of science and learning are extended to other departments of affairs, other vocations also receive the name. The word implies professed attainments in special knowledge as distinguished from mere skill. A practical dealing with affairs as distinguished from mere study or investigation; and an application of such knowledge to uses for others as a vocation, as distinguished from its pursuit for its own purposes."

An examination of the professional requirements for the practice of pharmacy demonstrates that the North Dakota classification of pharmacy as a profession is accurate. A registered pharmacist must be a graduate of one of the seventy-five accredited colleges of pharmacy, whose five-year program encompasses subjects such as organic chemistry, comparative anatomy, biochemistry, microbiology, physiology, chemical pharmacology, pharmacognosy, pharmaceutics, and qualitative analysis. The North Dakota pharmacist must have a year of practical experience as a pharmacy intern and pass an examination set by the Board of Pharmacy (N.D. Century Code § 43-15-15). Indeed, similar internship requirements are a condition of licensing in all states. A pharmacist must have extensive knowledge of a wide range of drugs, including familiarity with the recommended safe dosages for adults and children, storage requirements, quality standards, and the administering problems a patient might have. He must carefully comply with federal

and state regulations concerning the dispensing of "prescription-legend drugs," those designated by the Food, Drug, and Cosmetic Act as not safe for use except under the professional supervision of the physician and pharmacist. 21 U.S.C. § 353. Above all, he must assure the propriety of and the complete accuracy in the prescriptions he dispenses, whether these contain prefabricated dosage forms or ingredients he must still compound himself. An error of judgment as well as an error in the process of dispensing might well be fatal to the patient.

A pharmacist may be held liable for errors resulting from a failure to exercise "professional judgment." One of the most valuable professional services he can render is to *refuse* to dispense a medication if in his professional judgment he feels it would injure the patient or violate a law. *Tarleton* v. *Lagarde,* 16 So. 180, 26 LRA 325 (1894). A pharmacist cannot necessarily escape liability by claiming he filled the prescription as written.

> "The instant contention [of non-liability] is primarily based upon the assumption that the pharmacist is obliged to fill any and all prescriptions. Such is not the law. As a chemist he may know that the physician has erred in the prescription and that to fill it might cause death or serious injury to the patient." *Jones* v. *Walgreen Co.,* 265 Ill. App. 308 (Ill. 1932)

He must exercise professional judgment concerning the authenticity and accuracy of the prescription. In addition, a pharmacist has been held liable for the consequences of failing to advise a patient of the danger of using a particular drug in conjunction with another the pharmacist knows the patient is using. He has

a basic legal and ethical duty to advise the patient concerning the proper use and possible side effects of the medication. *Fuhs* v. *Barber,* 140 Kan. 373, 36 P.2d 962 (1934); and *Krueger* v. *Knutson,* 261 Minn. 144, 111 N.W.2d 526 (1961).

There is a category of drugs to be dispensed personally by a pharmacist at his discretion at the request of the patient (subject to state law), such as a number of drug products (cough suppressants, anti-diarrhea preparations) containing Schedule V controlled substances under the Controlled Substances Act, 21 U.S.C. §§ 812, 829. Under the regulations implementing this Act (21 CFR § 306.32), the pharmacist has personal and direct responsibility for determining medical need. For example, he cannot legally or ethically delegate his professional judgment in this area. The advice of a pharmacist to a patient concerning self-medication with non-prescription products is also a vital service clearly affecting the public interest and welfare.

Many pharmacists maintain, as a professional service, patient medication record systems in which individual patient information, including allergies, idiosyncracies and patient age, is retained and in which each prescription is entered. The system is used as a monitoring device to ensure that the prescription is appropriate for the particular patient and that the various drugs a patient is taking are not contraindicated. Such a problem could arise if the patient were seeing several physicians for different complaints.

This service is now required by a New Jersey Board of Pharmacy regulation to be provided by all New Jersey pharmacies. (N.J.A.C. 13:39-15). The New Jersey "patient profile record system" allows the im-

mediate retrieval of all data concerning prior medications and allergies of the patient. The pharmacist is required to check the record before dispensing the medication to determine the possibility of a harmful drug interaction or reaction. Further, he is to take appropriate action to avoid or minimize the problem, including consultation with the physician. This Board of Pharmacy regulation was attacked by several major, lay-controlled drug chains. But in an opinion handed down on May 8, 1973, a New Jersey court found sufficient evidence indicating the need for the regulation and sustained its validity. The court quoted with approval an article by Dr. Karl Neumann of Cornell Medical College:

> "He said by keeping records of all purchases, staying abreast of the latest reports of toxicity, noting previous allergic and adverse reactions of individuals and recording excessive purchase of any one item, the pharmacist could suddenly become one of the most important members of the health team." *Rite Aid of New Jersey, Inc.* v. *Board of Pharmacy of the State of New Jersey*, — N.J. Super. — (App. Div. 1973) (Case #A-1966-71)

B. Non-Professional Ownership of Pharmacies Has Resulted in Actual Control Over Pharmacists by Lay Persons or Entities, Thereby Adversely Affecting Their Professional Practice and Consequently the Public Welfare.

In 1972, the corporate chain drug store controlled 60.1% of the total national drug sales volume, amounting to $1.5 billion. This incursion by the commercial venture poses a serious threat to pharmacists and the public. When purely commercial interests wholly own or control pharmacies, the policies, practices and conduct of pharmacies have frequently been unduly influenced by commercial considerations. These abuses

range from the creation of an unprofessional environment and adverse working conditions to serious infringements on the pharmacist's responsibility for the control and dispensing of drugs.

The most serious abuses concern actual interference with the ordering and dispensing of drugs. In some instances, unauthorized non-professional personnel have dispensed prescription drugs, resulting in an obvious and serious health risk. In other cases, owners, for the sake of economy, have limited the drugs in stock to those which are subject to high volume. This policy is usually accompanied by a refusal to dispense drugs which require pharmacist compounding. A curtailment of the inventory is a threat to those patients who need such infrequently used drugs. It is an indisputable fact that the owners of a pharmacy have considerable influence in determining what quality and amount of equipment and stock will be ordered. Professional control of the pharmacy is needed to reduce that possibility that such abuses may occur.

Justice Holmes in his dissent in *Liggett Co.* v. *Baldrige* stated that:

> "A standing criticism of the use of corporations in business is that it causes such business to be owned by people who do not know anything about it. Argument has not been supposed necessary to show that the divorce between the power of control and knowledge is an evil. The selling of drugs and poisons calls for knowledge in a high degree, and Pennsylvania after enacting a series of other safeguards has provided that in that matter the divorce shall not be allowed." 278 U.S. at 114.

The divorce between control and professional knowledge leads to a lack of accountability for improper

actions. The employee pharmacist could argue practical compulsion and obedience to orders, while the employer could disclaim responsibility by pointing out that he merely hired. Indeed, it is true that lay management is not equipped to supervise adequately the professional staff. A particular pharmacist's incompetency could go unnoticed. Or the unlicensed employer could create a situation thwarting the pharmacist's professional efforts. In either case, the public loses the additional safety precaution of a management professionally trained and legally accountable for unethical conduct.

With control of the pharmacy in foreign hands, the pharmacist is often unable to establish policy or react to established policy over the pharmacy department itself. He finds himself forced into an employee role in which, fearing for job security, he is unable to protest practices which in his professional judgment are not aimed at the public welfare. Under Section 1 of the APhA Code of Ethics, a pharmacist must hold the health and safety of patients to be of first consideration; he should render to each patient the full measure of his ability as an essential health practitioner. Overriding commercial and profit goals and dilution of the pharmacist's attention with non-professional duties create an atmosphere where professionalism is adversely affected. In addition, abiding by Section 2 is likely to bring the pharmacist in direct confrontation with commercial pressures:

> "A pharmacist should never knowingly condone the dispensing, promoting, or distribution of drugs or medical devices, or assist therein, which are not of good quality, which do not meet standards required by law or which lack therapeutic value for the patient."

A drug store's practice of large scale promotions with a profit motive must upon occasion force a pharmacist into both unethical conduct and conduct injurious to the public.

While arguably less serious than practices opening up the possibility of unethical conduct, abuses have also occurred in the area of working conditions. These too pose a public health hazard serious enough to be condemned by Section 7 of the APhA Code of Ethics:

> "A pharmacist should not agree to practice under terms and conditions which tend to interfere with or impair the proper exercise of his professional judgment and skill, which tend to cause a deterioration of the quality of his service or which require him to consent to unethical conduct."

As a practical matter, however, pharmacists are often powerless to object to such conditions. APhA has received complaints from employed pharmacists regarding grossly unreasonable working hours. All states and the District of Columbia require the presence of a licensed pharmacist at all times during which medication is dispensed. Some commercial owners, in an effort to avoid hiring additional pharmacists, have required the pharmacist to work, for example, 13-hour shifts and thirteen consecutive days. The files of APhA contain additional unfortunate cases of pharmacists forced to tend other parts of the store and spend time on such chores as refunding soda bottle deposits. While such abuses may occur under pharmacist owners, the likelihood of commercial pressures and insensitivity to the need for the pharmacist to be alert and responsive to the patient is far greater under non-pharmacist owners; at least it should be clear that a

State, in considering preventive legislation, is entitled to so conclude.

Lay concern for the commercial venture, minimizing, through ignorance or avarice, the importance of the standards of the profession and the protection of the public, has a detrimental effect on professional morale, on the maintenance of proper safeguards and standards, and hence on the public safety. In addition to this indirect effect, lay control directly touches the public whenever administrative decisions are made concerning budgets, purchases, dispensing and other professional functions in the pharmacy department.

One type of non-pharmacist ownership is commonly recognized as an economic, ethical and social evil from the public's point of view: physician-owned pharmacies. Senate hearings held in response to complaints from national pharmacists' organizations uncovered and documented serious abuses surrounding the ownership of pharmacies by physicians. Report of the Subcommittee on Antitrust and Monopoly to the Senate Committee on the Judiciary, Physician-Ownership in Pharmacies and Drug Companies, 89th Cong., 1st Sess. (1965). The report noted that patients have been told, directly or indirectly by the prescribing physician, to have their prescription filled in the pharmacy in which the doctor has an ownership interest. This is accomplished by transmitting the prescription directly to the pharmacy via a direct telephone line, writing the prescription in code, advertising the pharmacy on the prescription form, or orally instructing the patient. The danger is the temptation to charge higher prices for drugs, to overprescribe or to write unnecessary prescriptions. A monopoly develops which deprives

the patient of any choice in his health care. A physician has total authority to prescribe any medication dictating the brand and amount; should his prescription mean economic benefit to him, both an unethical situation and a very real health hazard could easily arise.

California has met this problem with a statute forbidding physician ownership of pharmacies. Cal. Bus. & Prof. Code, Sec. 654. See *Megan Medical Clinic* v. *California State Board of Medical Examiners*, 57 Cal. Rptr. 256 (1967) holding the statute constitutional. Pennsylvania and Maryland empower the State Board of Pharmacy to sanction pharmacists who are associated with a pharmacy in which a medical practitioner has an interest. Pa. Stat. Ann., Tit. 63 § 390-5(9)(xii)(Supp. 1964); Md. Ann. Code, Art. 73, § 266A(c)(4)(iii) (Supp. 1964).

C. The State in the Exercise of Its Police Power May Properly Prohibit Corporations or Laymen From Controlling the Profession of Pharmacy.

It is well established that the regulation of a profession is a proper exercise of the state's police power. Depending on the needs of society in relation to each profession, the state may refuse to allow non-professional corporations to practice professions. Medicine and law are the traditional examples. (Professional corporations are required by state statutes to have professional control and personal liability in order to protect the public). The Illinois Supreme Court, in upholding the constitutionality of a statute prohibiting corporations from practicing dentistry said:

> "... The law is well settled that the state may deny to corporations the right to practice professions and may insist upon the personal obligation

> of individual practitioners . . . and this holding has been made regardless of the fact of existing contracts and investments made and entered into by corporations which were engaged in the practice of professions . . . ." *Winberry* v. *Hallihan*, 361 Ill. 121, 197 N.E. 552, 556 (1935).

The Supreme Court, in *Semler* v. *Oregon State Board of Mental Examiners*, 294 U.S. 608 (1935), reached the identical conclusion. The Court stressed the importance of professional standards:

> "We do not doubt the authority of the State to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards." 294 U.S. at 612.

A state's concern that a profession is demeaned and demoralized by lay control is therefore a highly legitimate reason for legislation—and not merely "rationally related" to the objective.

The Supreme Court in *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483 (1955), discussed a statute similar to North Dakota's pharmacy ownership provision and found the state's "attempt to free the profession [optometry], to as great an extent as possible, from all taints of commercialism" to be a rational objective. The statute in this case read:

> "No person, firm, or corporation engaged in the business of retailing merchandise to the general public shall rent space, sublease departments, or otherwise permit any person purporting to do eye examinations or visual care to occupy space in such retail store." 348 U.S. at 490-91.

The Court, following *Semler*, interpreted this statute as similar to a denial to a corporation of the right to practice dentistry. It concluded that:

> "Geographical location may be an important consideration in a legislative program which aims to raise the treatment of the human eye to a strictly professional level. We cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds." 348 U.S. at 491.

Thus, for a number of rational reasons, a state may deny a corporation the right to practice a particular profession. As a necessary corollary, a corporation may also be forbidden to exercise indirectly control it is forbidden to exercise directly. Were this not the case, an unlicensed party would be directing the professional activities of a licensed party and in effect "practicing without a license".

The most common evils which arise when a corporation acts as employer of such professionals include the strong possibility of undue influence, the disconnection

of the professional relationship between client or patient and the practitioner, and the corruption of the practitioner's motivations. The South Carolina Supreme Court in *Ezell* v. *Ritholz,* 188 S.C. 39, 198 S.E. 419 (1938) commented on personal or individual responsibility as the ethical basis of any profession:

> "One who practices a profession is responsible directly to his patient or his client. Hence, he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership whose interests in the very nature of the case are commercial in character." 198 S.E. at 424.

The Pennsylvania Supreme Court held in *Neill* v. *Gimbel Bros.,* 330 Pa. 213, 199 A. 178 (1938), that the vital importance to the public of the profession of optometry justified the state in regulating its proper practice. The statute prohibited corporations from practicing optometry; the corporation retail store was found to be practicing optometry since it controlled the optometrists. In *Gimbel,* an optical company operated an optical department in a retail store. The optometrists were hired and paid by the company but were under the control of the store; fees were set and collected by the store. The department store was held to be illegally engaged in the practice of optometry. The court rejected the contention that optometry was merely an incident to the corporate merchandising practice and held it rather to be a real science directed to the measurement, accommodation and refraction of the eye. Detailing the required curriculum and examination for a license, the court acknowledged it as an important profession. It noted that when a professional practitioner is the employee of a non-professional, subject to his control and dependent on him for a salary,

the likelihood is increased that the welfare of the patient will not be the sole criterion applied by the practitioner in rendering services to him. Quoting the Massachusetts Supreme Court in *McMurdo* v. *Getter*, 298 Mass. 363, 10 N.E.2d 139, 140 (1937), it noted that:

> "The rule is generally recognized that a licensed practitioner of a profession may not lawfully practice his profession among the public as the servant of an unlicensed person or a corporation; and that, if he does so, the unlicensed person or corporation employing him is guilty of practicing that profession without a license. A corporation as such cannot possess the personal qualities required of a practitioner of a profession. Its servants, though professional trained, and duly licensed to practice, owe their primary allegiance and obedience to their employer rather than to the clients or patients of their employer. The rule stated recognized the necessity of immediate and unbroken relationship between a professional man and those who engage his services." 199 A. at 181.

The Court in *Gimbel* found optometry to be a profession affected with a public interest.

> ". . . That case [Liggett] does not support the proposition that a licensed practitioner of a profession may be employed at a salary to render professional services to the customers of a person, partnership, or corporation, where the contractual relationship of the client or customers is, not with the practitioner, but with the latter's employer, and the chancellor decided as before noted that optometry is a profession. If a corporation hired a lawyer to render legal services under such arrangements, it would clearly be engaged in the practice of law. The legislature has the right to forbid such practice as contrary to public policy, which is properly concerned with the maintenance

> of high professional standards. One who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual fees and is under the control of an employer whose commercial interest is in the volume of sales of merchandise effected by the prescriptions of the employee-practitioner. These features were entirely absent from the Liggett case." 199 A. at 182.

Certainly since pharmacy affects the public interest to the same, if not a greater degree, as optometry, it should be clear that a State under its police power may eliminate what it finds to be the evil of lay control. The court's reasoning in *Gimbel* as to the inapplicability of *Baldrige* to optometry demonstrates the underlying fallacies of the *Baldrige* rationale. North Dakota has the right to forbid lay control of pharmacies as contrary to public policy. The State has sound public policy reasons for exercising that right. The maintenance of high professional standards, ethical requirements, and professional dignity, the need for a close professional-patient relationship, and the requirement of unfettered and unprejudiced professional judgment justify the State's conclusion that unqualified and unlicensed persons and corporations be prohibited from controlling the activities of the professional pharmacist.

It is anticipated that opponents of the contested North Dakota ownership statute will argue that by upholding the statute's constitutionality, this Court will cause economic losses to the chain drug stores. Of course, the short answer to this is that financial consequences do not determine the parameters of the exer-

cise of the State's police power. Surely, if this were a determining factor, a plethora of remedial legislation would fall. For example, many of the standards (42 U.S.C. § 1857f-1 *et seq.*) governing emissions of substances from automobile engines and many of the protections of the Federal Food, Drug and Cosmetic Act (21 U.S.C. § 301 *et seq.*) would fall if economics were the sole criterion. The expected *ad terrorem* arguments of the chains on the economic issue, we submit, are of little importance when compared with what North Dakota was entitled to find was the overriding public interest in divesting lay control from the profession of pharmacy.

CONCLUSION

For the reasons stated herein and in appellant's brief, the American Pharmaceutical Association and the National Association of Retail Druggists respectfully urge that the October 31, 1972 decision and order of the Supreme Court of North Dakota be reversed.

Respectfully submitted,

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